IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No.

LORENZO DOUGLAS,

Petitioner.

v.

STATE OF ARIZONA and
GARY K. NELSON, as
Attorney General of
the State of Arizona,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The petitioner, LORENZO DOUGLAS, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Court of Appeals of Pima County, Arizona, rendered on March 20, 1973, such opinion being denied review by the Supreme Court of the State of Arizona rendered on May 22, 1973.

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CASE CITATIONS

Coolidge vs. New Hampshire, 403 U.S. 443 . . . . . 4, 10, 14, 15

Mc Donald vs. United States, 335 U.S. 451 12

Stanley vs. Georgia, 394 U.S. 557 . . .12

Terry vs. Ohio, 392 U.S. 1. . . 3, 8, 9, 12

OPINIONS BELOW

The denial of the Petition for Review by the Supreme Court of the State of Arizona, as yet unreported, appears at Appendix A, *infra*, on page 17. The opinion of the Court of Appeals of Pima County, Arizona is unreported and appears at Appendix B, *infra*, page 18. The denial of the Motion for Rehearing in the Court of Appeals of Pima County, Arizona is unreported and appears at Appendix C, *infra*, page 23. The Supreme Court of Arizona denied review of the Judgment of the Court of Appeals of Pima County, without opinion.

JURISDICTION

The Order or Judgment of the Supreme Court of the State of Arizona was entered on May 22, 1973. See Appendix A, page 17, *infra*. This Petition for Certiorari was filed less than ninety (90) days from the

date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

QUESTIONS PRESENTED

The State of Arizona brought suit under A.R.S. Rules of Criminal Procedure, Section 13-302, as amended, for burglary in the first degree. The questions thereby arising are:

1. Whether the mere presence of a pistol in one's apartment constitutes enough of an exigent circumstance to justify the examination of the pistol to see if loaded under the Rule as set in Terry vs. Ohio, 392 U.S. 1, 88A S.Ct. 1868, 20 L.Ed2d 889 (1968), when:

    a. The officer that examined the pistol was invited into the apartment for purely investigative questioning,

    b. He examined the pistol in "plain view", merely because it was nearer to the questionee than himself,

    c. The officer had no search warrant,

d. The questionee was not under arrest,

e. The record indicated that the questionee did not make any threatening gestures and did not seem dangerous,

f. There was no suspicion at that time of any prior misconduct on the part of the questionee,

g. There was a lack of probable cause that either the questionee had committed any crime or the pistol had been involved in any crime.

(All the above which are uncontroverted and supported by the record).

2. Whether upon inspecting the pistol under the above circumstances does the "plain view" doctrine, as limited by Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed2d 564 (1971), prohibit the seizure of serial numbers from a pistol by memorization (the serial numbers not within plain view until the officer examined the pistol) for purposes of determining whether or not the pistol was stolen or involved in any particular crime. (The Officer admitted that he was conducting a "fishing expedition", preliminary hearing transcript, Page 18, L3-9).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated..."

Article II, Section 4, Constitution of the State of Arizona:

> "No person shall be deprived of life, liberty or property without due process of law."

STATEMENT OF FACTS

The undisputed facts are as follows: A Tucson police officer went to the apartment occupied by the petitioner and one JUAN JUARIQUE. He went there for the purpose of investigating the disappearance of two bar stools which had been taken from an apartment building just down the street from the building where the petitioner resided. Mr. Juarique opened the door and invited the officer in. (Petitioner was

not in the apartment at the time, but was in another apartment in the same building).

According to the officer, he asked Juarique if he could come in and talk to him concerning the matter that had happened several days prior and Juarique consentted to his doing so. After the officer asked a few questions, he noticed a small revolver sitting on the countertop that divided the kitchen area from the living-room area. The officer was about 12 to 13 feet from the gun and Juarique about 4 to 5 feet away. As soon as he observed the gun, the officer walked over to it and picked it up to see if it was loaded. He opened the cylinder, found that it was unloaded, and replaced it on the countertop. When he picked up the gun, he was able to see the serial numbers, which then were in plain view. He made a mental note of them, continued talking to Juarique and

then departed. Upon leaving the apartment, he made a written note of the serial numbers. The officer admitted that prior to entering the residence he had no reason to suspect that a crime had been committed involving the gun; that no crime had been reported committed in the neighborhood; that he was not aware of the burglary for which petitioner was subsequently charged and convicted; that he had no permission to inspect the revolver; that no arrests of either the petitioner or Juarique were made that day; and that he had no search warrant that day. (Preliminary Hearing Transcript, pages 22, L11-26, page 27, L1-9, page 64, L16-20).

Later that day, the officer checked the serial numbers against the police records which revealed that the gun was one of the items taken in the burglary of a residence. The following day, he and two

other officers obtained a search warrant for the petitioner's apartment and the search pursuant thereto disclosed the gun and several other items taken in the burglary. The petitioner was charged and convicted of first degree burglary.

RAISING OF FEDERAL QUESTION

Counsel for petitioner filed a Motion to Suppress the evidence introduced at the Preliminary Hearing on September 21, 1971, such motion being heard by the Superior Court of Pima County, Arizona, and denied on November 5, 1971.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the Fourth Amendment safeguards against unreasonable searches and seizures as enumerated in this Court's ruling in Terry vs. Ohio.

Terry established that an officer may make a warrantless search of a person to check for weapons if the officer, after careful observation, feels that the person

being observed is about to commit a crime or is armed and dangerous. One of the reasons for this limited exception to the usual Fourth Amendment safeguard against unreasonable searches and seizures is that the officer must protect himself when he believes that he may be in imminent peril.

The Court of Appeals of Pima County, Arizona held that under the circumstances (as in the Statement of Facts, *supra*) as were present, an "exigent circumstance" existed, and therefore, the officer's examination of the pistol (5 feet away from the defendant), which was in "plain view" did not constitute a search. To allow this decision to stand as precedent would be to ignore the import and rationale of this Court's ruling in Terry and could be construed as providing an "automatic exigent circumstance" allowing a warrantless search or seizure whenever an officer views

any weapon, wherever it or he may be.

2. The decision below directly conflicts with the Fourth Amendment safeguards against unreasonable searches and seizures regarding the "plain view" doctrine as enumerated in this Court's ruling in Coolidge vs. New Hampshire.

In Part II C of this Court's Opinion in Coolidge, Justice Stewart made clear the extent and limitations of the "plain view" doctrine. It was made clear that any search or seizure was

> "...*[A]*n evil, so that no intrusion at all is justified without a careful prior determination of necessity."
> *[Emphasis supplied]*

This being so, that any warrantless search of items in "plain view" cannot be valid unless made pursuant to one of the recognized "exigent circumstances" which serves to supplement the prior justification requirement that is common to all "plain view" situations:

"What the 'plain view' cases

> have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."
> *[Emphasis supplied]*

Thus, Coolidge established that in order to sustain the validity of a search or seizure under the "plain view" doctrine, the officer must initially have a warrant or there must be an "exigent circumstance" justifying the search or seizure without a warrant; and that the "plain view" doctrine could not be used to extend a general exploratory search from one object to another until something incriminating at last emerged. The "plain view" doctrine does not eliminate the requirements that the seizure of objects discovered through a "plain view" must comply with the Fourth Amendment and must be based on a valid warrant in the absence of "exigent circumstances"

Mc Donald vs. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153, (1948), and it has been suggested by this Court in the Coolidge decision (and indeed followed by several state courts) that the "plain view" doctrine will not justify seizure of the object where the incriminating nature of the object is not apparent from the "plain view" of the object. (See also Stanley vs. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed2d 542 (1969)).

The petitioner's argument was that no "exigent circumstance" under Terry existed to allow the officer to proceed across the room and inspect the pistol and even assuming that such "exigent circumstance" existed, did this mean that there was also another "exigent circumstance" apart from the one which allowed the officer to inspect the pistol, that allowed him to seize the serial numbers (in effect

the pistol) to determine whether the pistol was stolen or involved "in any particular crime" when the officer at that time had no probable cause to believe that Juarique had committed any burglary or had used the pistol in any crime?

The Court of Appeals of Pima County, Arizona held as to the "plain view" seizure as follows:

> "When the officer checked the weapon to see if it was loaded the serial number was readily visible. It was not unreasonable for him to make a mental note of a serial number which was opened to view *[citations]*..."

and this was to allow the officer to see if the pistol was stolen or involved in any particular crime.

This was all that the Court said about the matter and the cases used as a basis for its holding involved either obviously suspicious activities or a prior knowledge that the person was involved in a

crime.[1]

We believe that the opinion and decision of the Court of Appeals cannot be squared with this Court's ruling in Coolidge because there was no "exigent circumstance" (no probable cause and no evidence that the weapon was either stolen or used in any crime) present to allow the officer to memorize and seize the serial numbers to determine if the pistol was involved in any particular crime. This, coupled with the fact that there was absolutely no suspicious atmosphere and no danger of harm to the officer, flies in the face of

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[1]See State vs. Curtis, 10 Ariz. App. page 38, 455 P.2d 988 (1969). See also State vs. Stokes, 2 Ariz. App. 530, 410 P.2d 487 (1966).

every proposition mentioned in Coolidge regarding "plain view". Indeed if the Court of Appeals's ruling is allowed to stand, officers will be able to conduct "fishing expeditions" in their searches and will be able to pile "plain view" upon "plain view" to achieve the desired result as happened in the instant case. Here, the officer was allowed to proceed across the room and inspect the revolver because it was in "plain view" and then be allowed to memorize the serial numbers on the gun, then in "plain view" for purposes of conducting a "fishing expedition".

If this case were given approval, it would mean that either you or I would be susceptible to having officers enter our houses by either permission or warrant and then conduct general exploratory searches of all items within "plain view" to see what they could come up with. This would

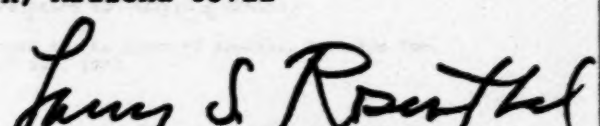
be constitutionally untenable.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals, Pima County, Arizona, as denied review by the Supreme Court of the State of Arizona.

RESPECTFULLY SUBMITTED,

SCHROEDER, SOELTER & ROSENTHAL, P.C.
940 South Craycroft
Tucson, Arizona 85711

By 
LARRY S. ROSENTHAL
Counsel for Petitioner

July 25, 1973

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA

Phoenix

85007

MARY ANN HOPKINS
DEPUTY CLERK

MAY 24 1973

May 23, 1973

STATE OF ARIZONA,

Appellee,

vs.

LORENZO DOUGLAS,

Appellant.

Supreme Court
No. 2721-PR

Court of Appeals
No. 2 CA-CR 312

Pima County
No. A-19670

The following action was taken by the Supreme Court of the State of Arizona on May 22, 1973, in regard to the above-entitled cause:

"ORDERED: Petition for Review - DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 23rd day of May, 1972.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Deputy Clerk

TO: Larry S. Rosenthal, Esq., Schroeder, Soelter & Rosenthal, 940 South Craycroft, Tucson 85711
Hon. Gary K. Nelson, Attorney General, 159 Capitol Bldg., Phoenix 85007
By: Peter Van Orman, Assistant Attorney General
Dennis DeConcini, Pima County Attorney, 131 West Congress, Tucson 85701
Hon. Jack G. Marks, Judge of the Pima County Superior Court, Pima County Courthouse, Tucson 85701

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
MAR 20 1973
CLERK COURT OF APPEALS
Division Two

THE STATE OF ARIZONA, Appellee,	)	NO. 2 CA-CR 312
v.	)	O R D E R
LORENZO DOUGLAS, Appellant.	)	RE: PIMA County Superior Court Cause No. A-19670

. . . . . .

Gary K. Nelson, The Attorney General
by Peter Van Orman, Assistant
Attorney General Tucson

Attorneys for Appellee

Schroeder, Soelter & Rosenthal, P.C.
by Larry S. Rosenthal Tucson

Attorneys for Appellant

. . . . . .

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk, and, under the Rules of the Supreme Court, Rule 47(a), fifteen days are allowed from this date to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the opinion, be sent to each party appearing or the attorney for such party and to The Honorable Jack G. Marks, Judge.

Dated: March 20, 1973.

James D. Hathaway, Chief Judge

Copies mailed as directed this
20th day of March, 1973.

Elizabeth Urwin Fritz, Clerk.

FILED
MAR 20 1973
CLERK COURT OF APPEALS
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STATE OF ARIZONA, Appellee, v. LORENZO DOUGLAS, Appellant.	)	2 CA-CR 312

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. A-19670

Honorable Jack G. Marks, Judge

AFFIRMED

Gary K. Nelson, The Attorney General
by Peter Van Orman, Assistant
Attorney General
Tucson

Attorneys for Appellee

Schroeder, Soelter & Rosenthal, P.C.
by Larry S. Rosenthal
Tucson

Attorneys for Appellant

H A T H A W A Y, Chief Judge.

Appellant seeks reversal of his burglary conviction solely on the grounds that a pretrial motion to suppress was erroneously denied.

The undisputed facts are as follows. A Tucson police officer went to the apartment occupied by defendant and one Juan Juarique, located at 901 N. 1st Avenue. He went there for the purpose of investigating the disappearance of two bar stools which had been taken from 901 N. Euclid, an apartment building just down the street from the building where defendant resided. Mr. Juarique opened the door and invited the officer in. (Defendant was not in the apartment at that time but was in another apartment in the same building).

According to the officer, he asked Juarique if he could come in and talk to him concerning the matter that had happened several days prior and Juarique consented to his doing so. After the officer asked a few questions, he noticed a small revolver sitting on the counter top that divided the kitchen area from the living room area. The officer was about 12 to 13 feet from the gun and Juarique about four to five feet away. As soon as he observed the gun the officer walked over to it and picked it up to see if it was loaded. He opened the cylinder, found it was unloaded, and replaced it on the countertop. When he picked up the gun, he was able to see the serial number which was in plain view. He made a mental note of it, continued talking to Juarique and then departed. Upon leaving the apartment, he made a written note of the serial number.

Later that day, the officer checked the serial number against the police records which revealed that the gun was one of the items taken in the burglary of a residence. The following day he and two other officers obtained a search warrant for the defendant's apartment and the search pursuant thereto disclosed the gun and several other items taken in the burglary. The defendant was charged with and convicted of first degree burglary.

The defendant's argument is that the search warrant was invalid since it was based upon the officer's memorization of a serial

number, the product of an illegal search and seizure. Therefore, he maintains, the items seized pursuant to the search warrant and his statement made at the time of the search, were inadmissible as "fruits of the poisonous tree."

There is no question but that the gun was in plain view on the countertop. Therefore the officer's observation of it did not constitute a search. State v. Forteson, 11 Ariz.App. 275, 464 P.2d 346 (1970). Furthermore, there is no question but that the officer was justified in taking reasonable precautions for his own safety. Terry v. Ohio, 392 U.S. 1, 88A S.Ct. 1868, 20 L.Ed.2d 889 (1968).

When the officer checked the weapon to see if it was loaded, the serial number was readily visible. It was not unreasonable for him to make a mental note of a serial number which was open to view. State v. Curtis, 10 Ariz.App. 38, 455 P.2d 988 (1969); State v. Stokes, 2 Ariz.App. 530, 410 P.2d 487 (1966). Defendant relies on the case of U.S. v. Sokolow, 450 F.2d 324 (5th Cir. 1971) to support his claim that the serial number was obtained as the result of an unlawful seizure thereof. That case, however, is clearly distinguishable on the facts.

In Sokolow, a police officer, acting upon reliable information that cigarettes had been stolen, followed a suspect's automobile which eventually backed up to Sokolow's garage. While arresting the suspect, the officer saw a number of air conditioning units stacked in the garage. He questioned Sokolow concerning the ownership of the equipment and in the course of this investigation, entered the garage and took serial numbers from the units without a search warrant. In rejecting the state's "plain view" argument, the court stated:

> "Except for suspicion, there was no justification for the officer to enter the garage. He had no legitimate reason to do so apart from the search directed at Sokolow. 'What the plain view cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.' (citation omitted)" 450 F.2d at 326.

There was no error in denying the motion to suppress and the judgment is affirmed.

JAMES D. HATHAWAY, Chief Judge

CONCURRING:

HERBERT F. KRUCKER, Judge

LAWRENCE HOWARD, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
APR 18 1973
CLERK COURT OF APPEALS
Division Two

STATE OF ARIZONA,	)	
	)	
Appellee,	)	No. 2 CA-CR 312
	)	
v.	)	O R D E R
	)	
LORENZO DOUGLAS,	)	Re: PIMA County
	)	Superior Court
Appellant,	)	Cause No. A-19670

IT IS ORDERED that the Motion for Rehearing be, and the same hereby is, DENIED.

Dated: April 18, 1973.

James D. Hathaway, Chief Judge

Lawrence Howard, Judge

Herbert F. Krucker, Judge

Copy mailed to:

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PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, LARRY S. ROSENTHAL, Attorney for LORENZO DOUGLAS, Petititioner, depose and say that on the 25th day of July, 1973, I served three (3) copies of the foregoing Petition for Writ of Certiorari on GARY K. NELSON, Attorney General for the State of Arizona, respondent herein, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to him at his post office address.

Larry S. Rosenthal
LARRY S. ROSENTHAL

SUBSCRIBED AND SWORN to before me this 25th day of July, 1973.

Marilyn Gobin
NOTARY PUBLIC

My commission expires: 4/7/77